Supreme Court, U.S.
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In The

Supreme Court of the United States

ANNA M. HALL,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a Title VII, gender discrimination case, for failure to promote a female certified licensed plumber, the Seventh Circuit Court of Appeals affirmed the United States District Court's granting of summary judgment to the employer, City of Chicago, holding that the employee, one of only four female certified licensed plumbers for the City's Department of Water, failed to rebut the employer's articulated legitimate, non discriminatory reason, in that she failed to present evidence that she was more qualified than the promoted men plumbers.

Does Rule 56 of the Federal Rules of Civil Procedure require the employee to present evidence that she is more qualified, as the only way of surviving summary judgment, where the employer uses subjective interview scores as the basis for promotion, and the employee has presented evidence that it is the male subjective interview scoring process that has resulted in her, as a female, receiving lower interview scores?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported. It is reproduced in the Appendix (App.1-8a). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (App.9-22a) is reported at 152 F. Supp. 2d 962, 970 (N.D. Ill. 2001).

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2) Section 703, in pertinent part, provides:

(a) It shall be an. unlawful employment practice, for an, employer . . .

(I) . . . or otherwise discriminate against any individual with respect to . . . terms, conditions, or privileges of employment because of such individual's sex. . . .

Fed. R. Civ. P. 56(c), in pertinent part, provides:

(c) . . . judgment . . . shall be rendered . . . if . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

STATEMENT OF THE CASE

Petitioner, Anna M. Hall, a female, filed a complaint in the District Court, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, for unlawful employment discrimination based on her gender.

Petitioner is a certified licensed plumber. Petitioner began employment with the City of Chicago's Department of Water, as a plumber, on August 16, 1995. Before beginning employment with the Department of Water, petitioner had ten years of plumbing experience. Petitioner's work experience included both residential and commercial plumbing, and she held plumbing related supervisory positions. Petitioner is one (1) of only four (4) female plumbers employed by the City's Department of Water. The other three female plumbers were hired after petitioner. Petitioner's foreman described her as "one of the best" plumbers. Another supervisor described petitioner as "the best" in her department. On two (2) performance evaluations, petitioner was rated a 4.85 out of a possible 5.0.

Between August 1997 and August 1999, petitioner interviewed numerous times for various vacant managerial/supervisory plumbing related positions with the City. Each time, petitioner was rejected. Each time, the positions were filled by male plumbers. The City's articulated reason for why petitioner was never promoted was that, the promoted men received higher "interview scores" than petitioner had received.

The positions that petitioner interviewed for were subject to bidding under the collective bargaining agreement with the Union. The process for filling such positions, as explained by the City, begins with the

Department of Water's personnel division submitting a "request for hire" to the City's Office of Budget and Management for funding of a vacant position. While approval for funding is pending, the personnel division prepares notices of vacancy for posting. Applications received within fourteen days of posting are forwarded to the City's Department of Personnel for review of qualifications. If the City's Office of Budget and Management approves the request for hire, the City's Department of Personnel sends to the Department of Water a list of those applicants qualified for the position. The Department of Water then conducts interviews of the qualified applicants and its Commissioner makes the promotion decisions based upon interview scores.

The interview process, as explained by the Department of Water, is as follows: One or more individuals, within the Department of Water, may ask a series of questions testing a candidate's substantive knowledge of plumbing procedures. Each interviewer rates each candidate on three forms, assigning a value on a scale of 1 to 5. Once the rating forms are completed, the bureau secretary prepares a list of the applicants who interviewed, ranking them from the highest to the lowest based on the overall scores from the rating forms. The list and rating forms are sent to the Department's personnel division for a mathematical accuracy verification by the Assistant Commissioner's Office. Then, the Commissioner generally approves the hiring of the candidate with the highest overall rating score.

The City of Chicago's Department of Buildings also has plumbing related positions. The Department of Buildings uses a procedure similar to the Department of Water in filling its plumbing related managerial/supervisory

positions. Likewise, as with the Department of Water, the City's Department of Personnel sends a list of the qualified applicants to the Department. The Department of Buildings uses the same interview scoring process as the Department of Water.

Petitioner applied for vacant positions with both the Department of Water and Department of Buildings for a total of fourteen (14) times. Petitioner was permitted to interview as a qualified applicant for eight (8) of the positions. Due to a lack of funding, no qualification list was issued and no interviews were scheduled for all the remaining applied-for positions.

Petitioner interviewed six (6) times with the Department of Water for the positions of Foreman, District Foreman, and Plumbing Inspector. Petitioner interviewed two (2) times with the Department of Buildings for the position of Plumbing Inspector. Petitioner received interview scores ranging from 2.0 to 3.2. The promoted men applicants received higher interview scores.

Petitioner contended that the interview and scoring process was discriminatorily subjective against her as a female, in violation of Title VII of the Civil. Rights Act. Petitioner presented the following evidence in support:

1. The interviews were conducted by men, using their subjective judgment.

2. With the exception of one true/false interview with the Department of Buildings, the ratings were based upon the individual interviewer's assignment of a value to the hiring criteria after asking the applicant a series of general questions. The value assigned to the hiring criteria for an applicant is the opinion of the individual interviewer.

The City did not produce documentation of the questions asked by the interviewers or of the answers given by any of the applicants. The interviewers sometimes were not plumbers, and worked in other City departments.

3. There is no rating review process for the applicants.

4. The rating forms do not show how an individual interviewer arrived at a particular rating for an applicant. The City provided reasons for its assignment of a value to the hiring criteria for plaintiff during discovery.

5. Plaintiff's plumbing experience, job performance, and educational background did not correlate with the low interview scores she received.

6. The City did not produce information on the plumbing experience, job performance, educational background, and other information for plaintiff to determine the correlation such information had to the scores of the promoted men in comparison to plaintiff.

7. In the case of the true/false interview, the City did not produce documentation of plaintiff's questions and answers to allow plaintiff to obtain an objective determination as to the number of questions she answered correctly or incorrectly. The City did not produce the questions and answers for the promoted men for determination as to the number of questions answered correctly or incorrectly in comparison to plaintiff.

8. Petitioner was assigned an interviewer, whom she had named in a previously filed sexual harassment grievance.

The United States District Court granted the City summary judgment on the basis that plaintiff did not present sufficient evidence of pretext in that plaintiff did not provide evidence that the interviewers did not truly believe the reasons for their scoring of plaintiff. The Seventh Circuit Court of Appeals affirmed the District Court holding that plaintiff failed to present evidence of pretext in that she failed to present evidence that she was more qualified than the promoted men.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision conflicts with this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), *rev'd on other grounds by The Civil Rights Act of 1991*. In *Patterson*, an employment discrimination case based upon race, the employer proffered that the promoted white applicant was better qualified for the job. The lower court held that the employee, in order to show pretext, was required to show that she was better qualified. This Court, in reversing, held that it was error for the District Court to instruct a jury that "petitioner could carry her burden of persuasion only by showing that she was in fact, better qualified than the person who got the job." This Court reasoned that "there are a variety of types of evidence that an employee can introduce to show that an employer's stated reasons are pretextual, and the plaintiff may not be limited to presenting evidence of a certain type." *Id.* 491 U.S. at 186-187, 109 S. Ct. at 2378.

By way of analogy, an employee at the summary judgment stage, should not be limited to showing that she is "more qualified", as the only way of surviving summary

judgment, where the employer uses scores obtained from subjective interviews to determine who is more qualified. To hold otherwise would have a chilling effect upon a protected class of employees, who historically have been excluded from the "trades" and therefore are in a position where decisions about their qualifications are made entirely by members of the non class. Stereotyping, prejudices, and resentment against inclusion of the class in the trades may affect the decision makers' perception on the value of the employee's qualifications. The employer could continue to discriminate against the protected class, simply by proffering "higher score" as the legitimate reason, knowing that the employee would never be able to rebut that reason, on its face.

In the instant case, petitioner presented evidence in support of her contention that it was a discriminatory subjective interview scoring process that resulted in an otherwise qualified female plumber receiving lower scores than the male plumbers. A genuine issue of material fact was raised as to whether plaintiff received the lower scores because of discrimination based upon gender. Due to the subjective nature of the interview scoring process, of issue were the credibility and motivation of the individual interviewers. This Court, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986) reiterated that in motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure 56, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions. . . ." *Id.* 477 U.S. at 255, 106 S. Ct. at 2513.

Further, limiting petitioner to presenting evidence that she was more qualified, as the only way of surviving summary judgment, disregards the disparate impact

method of showing gender discrimination. An employee may show unlawful discrimination where the employer's subjective promotional procedures, appearing facially neutral, impacts a protected class in an adverse way, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). In *Watson*, a case involving employment discrimination based upon race, petitioner was repeatedly rejected for promotions. The employer's promotion policy relied on the subjective judgment of white supervisors. This Court held that the lower courts erred in failing to allow petitioner to challenge the subjective promotional system under the disparate impact analysis.

Likewise, in the instant case, the City used "higher interview scores", as the basis for promotion. "Higher interview scores" may on its face appear to be a neutral and non-discriminatory basis for promotion. However, the interviews were conducted by men, using their subjective judgments in scoring on matters that were not determined to be necessarily job related.

Petitioner should have been allowed to present her case to the jury, because under this Court's reasoning in *Patterson*, she was not just limited to presenting evidence that she was more qualified, in order to survive summary judgment.

CONCLUSION

WHEREFORE, Petitioner, Anna M. Hall, respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued January 15, 2002
Decided November 20, 2002

Before

Hon. JOEL M. FLAUM, *Chief Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

No. 01-2036

Anna M. Hall, *Plaintiff-Appellant,* *v.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
City of Chicago, *Defendant-Appellee.*	No. 98 C 4682 John W. Darrah, *Judge.*

ORDER

Anna M. Hall, a licensed plumber, claims that the City of Chicago's ("City's") repeated failure to promote her constitutes unlawful discrimination based on her gender. On July 29, 1998, Hall filed a *pro se* complaint of discrimination in district court, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* After obtaining legal counsel, Hall twice amended her complaint to allege, *inter alia,* that the City discriminated against her based on her gender and retaliated against her for complaining of environmental hazards in the workplace. The

district court granted the City summary judgment on each of Hall's claims, holding that Hall had failed to rebut the City's legitimate reasons for not promoting her, and that Hall had failed to establish a *prima facie* case of retaliation under Title VII. We affirm.

I. Factual Background

On August 16, 1995, the City hired Hall to work as a plumber with the Department of Water ("Water Department"). By that time, Hall had completed a plumber's apprenticeship and was certified as a licensed plumber. For three years, from 1996 to 1999, Hall was the only female plumber in the South District of the Water Department, where she was employed. As of March 2000, she was one of only four female employees in the entire Department.

The Water Department is comprised of four district offices, each of which has a general superintendent, a district superintendent, and an assistant district superintendent. Hall's district, the South District, also employs four "district foremen" who supervise a number of regular foremen. Each regular foreman supervises between one and three work crews. The work crews, made up of plumbers and caulkers,[1] are supervised by the "plumbers or caulkers in charge." The Water Department also employs "plumbing inspectors" to inspect the work of its plumbing crews.

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[1] A caulker is a person who has not yet been "certified" as a plumber, but who nonetheless does the work of a plumber.

When a regular foreman, district foreman, plumber in charge, or plumbing inspector position becomes vacant, the Water Department's Personnel office posts a vacancy announcement for a fourteen-day period during which it accepts applications from prospective candidates. The Personnel Office then sends a "request for hire" to the Office of Budget Management ("OMB") to secure continued funding for the position. If the request for hire is ultimately granted by the OMB, the Personnel Office schedules interviews with those applicants who meet the basic criteria for the job. If OMB denies the hiring request, the Personnel Office sends each applicant a letter informing her that the position will not be filled that year.

Candidates are interviewed for the various positions by one or more supervisors within the Water Department. Each interviewer receives a packet containing the candidate's bid application form (with information on the candidate's education, relevant experience, and other background facts), a set of "hiring rating forms," and a copy of the Water Department's "Interviewer Guidelines." During the interview, the interviewers rate each candidate, on a scale of "1 to 5," in a number of different areas, including, *inter alia,* training, experience, written communication skills, and oral communication skills. Each interviewer arrives at an overall interview score for each candidate, using a standard weighted-average formula. The candidates are then ranked, from the highest to the lowest, according to their composite interview scores. The Water Department's Commissioner, who makes the hiring decisions, generally hires the candidate with the highest overall interview score. Seniority may be taken into account if there is a tie between two or more candidates.

The hiring process employed by the City's Department of Buildings ("Buildings Department") is similar to the process used in the Water Department. The Buildings Department posts vacancy notices for two weeks, accepts applications during that time, and schedules interviews with those candidates who meet the basic requirements for the job. Qualified candidates are interviewed by a panel of two or more interviewers, and each interviewer assigns each candidate an overall interview score based on a "1 to 5" scale. The Commissioner of the Buildings Department also generally hires the candidate with the highest overall interview score.

Since she was hired by the City in August of 1995, Hall has applied for a promotion on at least fourteen occasions. Specifically, she has filed applications to fill vacant regular foreman, district foreman, and plumbing inspector positions. Each time, however, the vacancy has either been closed for lack of funding, or the position has been given to an applicant with a higher overall interview score.

At least four times, in August of 1997 and in February, March and August of 1998, Hall submitted bids for district foreman positions in the Water Department. Three of the district foreman positions were canceled for lack of funding, however. With respect to the fourth position, Hall received an overall interview score of "2," while the successful candidate scored an overall rating of "5."

Hall also submitted applications for regular foreman positions in the Water Department in January and August of 1998. The January 1998 position was closed for funding reasons, and the August 1998 vacancies were filled by candidates with higher interview scores. While Hall

received an overall interview score of 3.2, those hired all received scores of 4.6 or higher.

Finally, Hall applied at least nine times to fill plumbing inspector vacancies, both in the Water Department and in the Buildings Department. Five of the plumbing inspector vacancies were withdrawn for funding reasons. As to the positions that were filled, Hall again scored lower in each case than the male candidate who was ultimately hired. In one of Hall's unsuccessful plumbing inspector interviews, her interviewer noted that she was "well below average in knowledge as well as communication skills."

II. Procedural Background

Hall filed the instant action on July 29, 1998, within ninety days of receiving a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). In her Second Amended Complaint, Hall alleged that the City violated Title VII by: (1) failing to promote her, (2) failing to notify her of job vacancies, (3) compelling her to work in a contaminated work environment, (4) retaliating against her for reporting such contamination, and (5) failing to discipline a supervisor-employee who had used inappropriate language in reference to her. On March 31, 2000, the City moved for summary judgment, which was granted by the district court on March 29, 2001.

II. Issues

On appeal, Hall asserts that the district court erred in holding that Hall had failed to present a material issue of fact as to: (1) whether the City's failure to promote Hall was discriminatory; and (2) whether the City retaliated

against Hall in violation of Title VII. Hall believes these issues should have gone to a jury, and that summary judgment was improper.

III. Discussion

A. Standard of Review

Summary judgment is properly granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). " 'Only when we determine that no reasonable factfinder could decide for the nonmoving party is summary judgment appropriate.' " *Gleason v. Mesirow Fin., Inc.,* 118 F.3d 1134, 1139 (7th Cir. 1997) (quoting *McKenzie v. Illinois Dept. of Transp.,* 92 F.3d 473, 479 (7th Cir. 1996)). In order to successfully defeat a summary judgment motion, therefore, the nonmoving party must raise more than a "metaphysical doubt" as to the material facts. *Id.* This Court reviews a grant of summary judgment *de novo,* and in so doing, views all facts in the light most favorable to the nonmoving party. *Id.*

B. Hall's Discrimination Claim

Title VII makes unlawful certain workplace discrimination, including an employer's "fail[ure] or refus[al] to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In all cases, the plaintiff bears the burden of proving discrimination under Title VII. *See Grube v. Lau Indus., Inc.,* 257 F.3d 723, 727 (7th Cir. 2001). Where, as here, there is no "direct" proof of gender

discrimination, a plaintiff may raise an inference of discrimination by first establishing a *prima facie* case. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.E.2d 668 (1973).

To make a *prima facie* case of discriminatory failure to promote, Hall must demonstrate that she is a member of a protected class, has applied for and was qualified for the promotion sought, was nonetheless rejected, and the promotion was given to a person not in the protected class. *Gorence v. Eagle Food Centers, Inc.,* 242 F.3d 759, 764-5 (7th Cir. 2001). If Hall succeeds, the burden shifts to the City to present a legitimate, non-discriminatory basis for not promoting her. *Paluck v. Gooding Rubber Co.,* 221 F.3d 1003, 1009 (7th Cir. 2000). Hall may rebut the City's proffer, however, by producing "evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory." *Sattar v. Motorola, Inc.,* 138 F.3d 1164, 1169 (7th Cir. 1998) (citations omitted).

Before the district court, the City presented evidence that it had denied Hall's applications for promotion on the basis of her deficient interview scores.[2] As noted by the

[2] The City also, in a number of instances, denied Hall's application for promotion because it had been denied funding for the position for which Hall had applied. Hall presents no evidence that the City's decision to cancel certain job vacancies was discriminatory, however. She does make a bare allegation that, in 1997, although the City withdrew vacancy notices for two plumbing inspector vacancies (prior to conducting interviews), at some point during that year, two men in the Water Department were promoted to plumbing inspector positions. *See* Hall Br. at 20. However, Hall provides no evidence that the two men were promoted to vacancies for which Hall herself submitted an application, or that their promotions bore any relation to the vacancies

(Continued on following page)

district court, "Plaintiff [had] interviewed [for the promotions] before a number of different panels made up of various supervisors," and yet, "[t]ime and again, [had] received lower scores than her peers." *Hall v. City of Chicago,* 152 F.Supp.2d 962, 970 (N.D.Ill. 2001). The City having presented a legitimate, non-discriminatory basis for its failure to promote Hall, the burden then shifted to Hall to present evidence that the City's stated reason for not promoting her was mere pretext. Finding that Hall had failed to meet her burden, the district court granted summary judgment to the City on Hall's discrimination claim.

On appeal, Hall maintains that the City's proffered basis for not promoting her, *i.e.,* her low interview scores, was mere pretext and that its true motivation was discriminatory. To succeed, Hall must demonstrate that the City's claimed reliance on the interview scores was a "lie." *Brill v. Lante Corp.,* 119 F.3d 1266, 1269 (7th Cir. 1997). If the City honestly believed in its stated basis for not promoting Hall, Hall's discrimination claim will fail even if such justification is "foolish or trivial or even baseless." *Id.*

Hall takes great pains to demonstrate that the City was "lying" when it claimed to have relied on Hall's low interview scores as the basis for its decisions. She argues that her "extensive training, knowledge and experience," as well as her past positive job reviews belie her low interview scores and the City's decisions not to promote

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canceled by the City that year. Hall thus fails to refute the City's statement that it canceled the vacancies because OBM refused to fund such positions, rather than for discriminatory reasons. *See* City's Fact Statement ¶ 39(j).

her. Hall Br. at 16. Hall also claims that the subjective nature of the interview scores, and the sheer number of times that she was passed over for promotions raise "genuine questions of material facts [sic] regarding pretext." Hall Br. at 16, 18.[3]

Notwithstanding her efforts, Hall has failed to raise a material issue of fact as to whether the City's purported reliance on the interview scores was false. Her claim that the subjective nature of the interview scores implies pretext is legally untenable, given her lack of evidence that the interview criteria and scoring system were a "mask" for discrimination. *See Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002) (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001)) (" '[a]bsent evidence that subjective hiring criteria were used as a

[3] Hall takes half-hearted jabs at the interview process itself, arguing that the City: (1) improperly ignores *past* interview performances in the formulation of subsequent interview scores, *see* Hall Br. at 8 (stating that, in one case, a successful applicant had "answered two questions wrong in a *prior* interview," implying that the interviewer somehow erred by ranking him higher than Hall in a subsequent interview), and (2) improperly allows persons who are not plumbers themselves to interview plumbers seeking promotion in the Department, *see id.* at 8, 10. However, it is entirely reasonable for the City to base its promotion decisions on *current* interview performances (rather than incorporating past performances). So, too, is it reasonable for the City to use department supervisors, even those who may not be certified plumbers, as interviewers, given that many factors *in addition to* an applicant's plumbing knowledge are material to the City's hiring decisions.

Neither of these arguments supports a finding that the City's claimed reliance on the interview scores in its promotional decisions was a "lie," or even that reliance on such scores was misplaced. Accordingly, these arguments fail to raise an issue of material fact as to the issue of pretext.

mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII . . .'").

Moreover, Hall's self-serving references to her own "exceptional experience and training" are insufficient to cast doubt on the validity of the interview scores, or the sincerity of City in claiming reliance thereupon. Indeed, the relevant question is *not* what experience, knowledge and skills Hall possesses, as an absolute matter, but whether she was more qualified for the various positions *relative to the successful candidates* who were hired based on their superior interview scores. If Hall had presented evidence that her interview scores were themselves discriminatory, or that they were not based in fact, Hall might have raised a triable issue of fact regarding pretext. *See Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995) (requiring that, to raise a material issue of fact regarding pretext, the plaintiff produce evidence that the proffered basis for the employment decision "had no basis in fact," did not in fact motivate the decision, or was "insufficient" to motivate the decision).

Hall has failed to present any evidence that the interview scores she received were inaccurately adjusted downward or that, in spite of her consistently sub-par interview scores, she was in fact more qualified for the positions than the individuals promoted by the City. Instead, Hall repeatedly complains that *the City* "failed to offer any evidence whether [sic] *any* of the successful applicants achieved comparable career successes." *Id.* at 17 (emphasis in original). But the burden of production in this case was on Hall, not the City.

Because Hall failed to present any evidence that the City's articulated reason for not promoting her was pretextual, Hall's discrimination claim fails as a matter of law. Accordingly, the district court correctly granted the City's Motion for Summary Judgment as to Hall's discrimination claim.

C. Hall's Retaliation Claim

Hall urges reversal of the district court on the additional basis that its denial of her retaliation claim was in error. Title VII prohibits employers from "discriminat[ing] against any . . . employee[ ] . . . [on the basis that] [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Before the district court, Hall alleged that the City had retaliated against her for filing complaints about environmental hazards associated with her work truck. *See* Second Amended Complaint ¶ 11(E). As the district court rightly noted, however, "Title VII was not intended to protect workers from hazardous conditions in the workplace," [District Court Order] at 11. Hall's prior complaints of environmental hazards did not qualify as statutorily-protected expression under Title VII, therefore, and Hall's retaliation claim was properly denied.

In an apparent effort to revive her retaliation claim on appeal, Hall now argues that she engaged in expression that *was* protected by Title VII – namely, by complaining of gender discrimination and filing a charge of gender discrimination with the EEOC. It is well-settled, however,

that an issue that is not raised before the trial court is waived on appeal. *See Moulton v. Vigo County,* 150 F.3d 801, 803 (7th Cir. 1998).

At no point in her complaints, amended or otherwise, did Hall ever allege that the City retaliated against her because she had previously filed discrimination complaints and an EEOC charge. Although Hall did make such an argument in opposition to the City's summary judgment motion, she failed to amend her complaint to state such allegation. *See Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir. 1996) ("a plaintiff may not amend h[er] complaint through arguments in h[er] brief in opposition to a motion for summary judgment."). Hall therefore waived her claim of retaliation based on her prior discrimination complaints, and we need not consider the merits of such claim on appeal.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

ANNA HALL,	)	
Plaintiff,	)	**Case No. 99 C 4682**
	)	**The Honorable**
v.	)	**John W. Darrah**
CITY OF CHICAGO,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Anna Hall ("Hall") filed a one-count Second-Amended Complaint against Defendant City of Chicago ("the City") for sex discrimination in violation of Title VII of the Civil Rights act of 1964 ("Title VII"), as amended 42 U.S.C. § 2000(e) et seq., and 42 U.S.C. § 1981. (2A. Compl.).

Defendant has moved for summary judgment pursuant to FED.R.CIV.P. 56. For the reasons that follow, the Court GRANTS Defendant's Motion for Summary Judgment.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); *Patel v. Allstate Insurance Co.*, 105 F.3d 365, 367 (7th Cir. 1997). The movant bears the initial burden of establishing that the record presents no genuine

issue of material fact. *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304, 1308 (7th Cir. 1997). Then the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e).

The nonmovant cannot succeed in creating a factual dispute solely by resting on allegations in the pleadings but must produce evidence showing there is a disputed issue for trial. *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). In order to withstand summary judgment, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Only genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

FACTS

Considering the undisputed facts from the parties' Local Rule 56.1(a) & (b) statements of material facts (referred to herein as "Pl.'s 56.1" and "Def.'s 56.1") and drawing all reasonable inferences from the evidence in Plaintiff's favor, the facts, for purposes of resolving the summary judgment motion, are as follows.[1]

[1] Consideration of the 56.1 fact statements was limited to those which were properly made in accordance with LR 56.1, FED.R.CIV.P. 56(e), and the Federal Rules of Evidence.

On May 9, 1994, Plaintiff Anna Hall received her plumbing license, after successfully passing the plumbing examination. (Pl.'s 56.1 ¶ 4). She had worked as an apprentice plumber for five years before taking the test. (Pl.'s 56.1 ¶ 6). Plaintiff began working for the City of Chicago Department of Water as a plumber on August 16, 1995. (Def.'s 56.1 ¶ 13). Since May, 1997, Plaintiff has been employed as a plumber at the Department's Bureau of Water Pipe Distribution for the South District. (Def.'s 56.1 ¶ 14).

Richard Green is the General Superintendent in charge of the South District. (Def.'s 56.1 ¶ 36). Reporting to him is District Superintendent Mulbe Dillard, Sr. (Def.'s 56.1 ¶ 36). Assistant District Superintendent Flenory Barnes reports to Dillard. (Def.'s 56.1 ¶ 36). Four District Foremen report to Barnes. (Def.'s 56.1 ¶ 36).

Acting foremen are individuals designated to assume the role and responsibilities of a foreman when there is a vacancy within a District and a pressing need to have it filled. (Def.'s 56.1 ¶ 27). The General Superintendents of the Districts are responsible for selecting individuals that they deem to be qualified to take the position. (Def.'s 56.1 ¶ 27). There is no formal application process for the position of acting foreman (Pl.'s 56.1 ¶ 21, 22). Often, friends of the supervisors are named to be acting foremen. (Pl.'s 56.1 ¶ 21, 22). Plaintiff has never been named to be an acting foreman. (Pl.'s 56.1 ¶ 34).

Promotional Procedure

Each candidate is interviewed by one or more individuals who usually hold supervisory positions within the Water Department. (Def.'s 56.1 ¶ 42). The interviewers do

not see the personnel file of any applicant at any time. (Def.'s 56.1 ¶ 43). Each applicant is interviewed separately. (Def.'s 56.1 ¶ 44). Each interviewer is responsible for documenting his or her assessment of a candidate's qualifications. (Def.'s 56.1 ¶ 46). The interviewers rank the candidates in different categories, assigning scores of 1 to 5. (Def.'s 56.1 ¶ 46). Using a formula explained on the ratings sheets, the rankings are totaled to attain a composite score. (Def.'s 56.1 ¶ 46). There is an additional form entitled, "Interviewer's Evaluation of Applicant." (Def.'s 56.1 ¶ 46). It provides space for the interviewer to insert handwritten comments about the candidate's previous work experience. (Def.'s 56.1 ¶ 46). The interviewer also circles one of three categories describing the candidate as "below requirements," "meets requirements," or "exceeds requirements." (Def.'s 56.1 ¶ 36). After the interviews are concluded, a document is generated by the Bureau secretary listing all applicants who were interviewed for the position and their respective overall ratings. (Def.'s 56.1 ¶ 47). The Commissioner of the Department generally approves hiring the candidate with the highest overall rating score without conducting any independent review of that candidate's qualifications. (Def.'s 56.1 ¶ 50).

Plaintiff's Interview Experiences

In August of 1997, Plaintiff submitted a bid application for a District Foreman of Water Pipe Construction position. (Def.'s 56.1 ¶ 52). No interviews were conducted. (Def.'s 56.1 ¶ 52). On or about December 8, 1997, Plaintiff was notified by letter that the position would not be filled. (Def.'s 56.1 ¶ 52).

In August of 1997, Plaintiff submitted a bid application for a Plumbing Inspector position in the Department of Water. (Def.'s 56.1 ¶ 53). No interviews were conducted. (Def.'s 56.1 ¶ 53). On or about December 12, 1997, Plaintiff was notified by letter that the position would not be filled. (Def.'s 56.1 ¶ 53).

In January of 1998, Plaintiff submitted a bid application for a Foreman of Water Pipe Construction position. (Def.'s 56.1 ¶ 54). Thereafter, the bid was canceled. (Def.'s 56.1 ¶ 54). On or about January 29, 1998, Plaintiff was notified by letter that no bids would be accepted for this position. (Def.'s 56.1 ¶ 54).

About February 12, 1998, Plaintiff submitted a bid application for a District Foreman of Water Pipe Construction position. (Def.'s 56.1 ¶ 55). Thirty-seven eligible individuals interviewed for this position. (Def.'s 56.1 ¶ 55). Plaintiff was interviewed on or about June 11, 1998 by General Superintendent Richard Green. (Def.'s 56.1 ¶ 55). Green had heard from Plaintiff's supervisors that she had problems getting along with people and that there were frequent arguments and conflicts on the jobs on which she worked. (Def.'s 56.1 ¶ 55). Green gave Plaintiff a score of 2.0 out of 5.0 in the following categories: "Qualifications and Previous Work Experience," "Previous Performance of Similar Duties with the Bureau," and "Written Communication Skills." (Def.'s 56.1 ¶ 55). Plaintiff's overall rating was 2.0. (Def.'s 56.1 ¶ 55). She was not rated the most qualified of the candidates. (Def.'s 56.1 ¶ 55). Green noted that Plaintiff "lacks quality work experience and written and oral skills." (Def.'s 56.1 ¶ 55). The male employee who received the job received an overall rating of 5.0. (Def.'s 56.1 ¶ 55). Plaintiff received the third lowest rank. (Def.'s 56.1 ¶ 55).

In February of 1998, Plaintiff submitted a bid application for one of the Plumbing Inspector positions in the Department of Water with assigned Bid Number 05598014. (Def.'s 56.1 ¶ 56). A Plumbing Inspector is responsible for inspecting work performed by the plumbing crews. (Def.'s 56.1 ¶ 56). Eleven eligible candidates were interviewed for these positions. (Def.'s 56.1 ¶ 56). Plaintiff was interviewed on March 26, 1998 by then-Plumbing Inspector in Charge Thomas Haggerty, Assistant Chief Plumbing Inspector Robert Kendrick, and Assistant Chief John Griffin. (Def.'s 56.1 ¶ 56). Plaintiff was scored in the categories of "Qualified and Related Previous Experience," "Previous Preferred Similar Duties with City," "Written Communication Skills," and "Oral Communication Skills." (Def.'s 56.1 ¶ 56). Plaintiff was not rated the most qualified by any of the three interviewers. (Def.'s 56.1 ¶ 56). She received overall ratings of 3.25 from Haggerty, a 3.5 from Griffin, and 3.25 from Kendrick. (Def.'s 56.1 ¶ 56). The male employees who received the positions received composite scores of 4.0 and 4.25. (Def.'s 56.1 ¶ 56).

On February 12, 1998, Plaintiff submitted a bid application for a Plumbing Inspector position in the Department of Water with assigned Bid Number 05598015. (Def.'s 56.1 ¶ 57). Seven eligible individuals interviewed for this position. (Def.'s 56.1 ¶ 57). Plaintiff was interviewed on May 8, 1998 by then-Plumbing Inspector in Charge Thomas Haggerty, Employee Relations Supervisor Mark Kochan, and Assistant Chief Plumbing Inspector Robert Kendrick. (Def.'s 56.1 ¶ 57). Plaintiff was not rated the most qualified. (Def.'s 56.1 ¶ 57). The two male candidates who received the highest scores were awarded the promotions. (Def.'s 56.1 ¶ 57).

In March of 1998, Plaintiff submitted a bid application for a District Foreman of Water Pipe Construction position with Bid Number 05598052. (Def.'s 56.1 ¶ 58). No interviews were conducted, and the position was not filled. (Def.'s 56.1 ¶ 58).

In the Spring of 1998, Plaintiff submitted bid applications for a number of Plumbing Inspector positions in the Department of Water. (Def.'s 56.1 ¶ 59). Plaintiff was interviewed on July 30, 1998. (Def.'s 56.1 ¶ 59). She received a composite score of 2.5. (Def.'s 56.1 ¶ 59). The four male candidates who received the highest scores received offers of promotion. (Def.'s 56.1 ¶ 59).

In June of 1998, Plaintiff submitted a bid application for a District Foreman of Water Pipe Construction position. (Def.'s 56.1 ¶ 60). On or about January 27, 1999, Plaintiff received a letter advising her that the position would not be filled. (Def.'s 56.1 ¶ 60).

In August of 1998, Plaintiff submitted bid applications for Foreman of Water Pipe Construction positions. (Def.'s 56.1 ¶ 61). Twenty-four eligible individuals were interviewed for these positions. (Def.'s 56.1 ¶ 61). Plaintiff was interviewed by Assistant Commissioner White. (Def.'s 56.1 ¶ 61). She was not rated the most qualified, receiving an overall rating of 3.2. (Def.'s 56.1 ¶ 61). The 10 male candidates who received offers of promotion received scores of 4.6 or higher. (Def.'s 56.1 ¶ 61).

In September of 1998, Plaintiff submitted a bid application for a Plumbing Inspector position in the Department of Water. (Def.'s 56.1 ¶ 62). Seven eligible individuals were interviewed for this position. (Def.'s 56.1 ¶ 62). The interviews were conducted by Plumbing Inspector Michael McGinnis, Plumbing Inspector in charge

James Marsh, and Plumbing Inspector in Charge Chester Szorc. (Def.'s 56.1 ¶ 62). Plaintiff was interviewed on October 30, 1998. She was not rated the most qualified. (Def.'s 56.1 ¶ 62). Five male applicants who received higher ratings than Plaintiff were promoted. (Def.'s 56.1 ¶ 62).

In April and August of 1999, Plaintiff submitted bids for Plumbing Inspector positions in the Department of Water which were never filled. (Def.'s 56.1 ¶ 63, 64).

On April 15, 1998, Plaintiff submitted a bid application for vacant Building Department Plumbing Inspector positions. (Def.'s 56.1 ¶ 68). Eight people were interviewed for these positions. (Def.'s 56.1 ¶ 68). Plaintiff was interviewed on May 21, 1998 by Assistant Chief Plumbing Inspector Donald Monreal, Plumbing Inspector in Charge Daniel J. Boyle, and Edward Severns. (Def.'s 56.1 ¶ 68). Out of ten true/false questions asked, Plaintiff, she answered at least 6 incorrectly. (Def.'s 56.1 ¶ 68). Each interviewer scored the candidates in the categories of: "work experience," "training," "communication skills," and "technical knowledge." (Def.'s 56.1 ¶ 68). Plaintiff was not rated as the most qualified of the candidates. (Def.'s 56.1 ¶ 68). Severns noted that she was "well below average in knowledge as well as communication skills." (Def.'s 56.1 ¶ 68). The three top scorers (all male) received offers of promotion. (Def.'s 56.1 ¶ 68).

In June of 1998, Plaintiff submitted a bid application for the Plumbing Inspector position in the Department of Buildings. (Def.'s 56.1 ¶ 69). Only three applicants interviewed for this position. (Def.'s 56.1 ¶ 69). The interviews were conducted by Timothy Cullerton, Bill Rooney, and Don Monreal. (Def.'s 56.1 ¶ 69.) Plaintiff was interviewed

on September 1, 1998. (Def.'s 56.1 ¶ 69). Plaintiff received an overall ranking of 2.9. (Def.'s 56.1 ¶ 69). The highest scoring candidate received a score of 3.2. (Def.'s 56.1 ¶ 69). He received the promotion.

Bob Megro, Plaintiff's supervisor, gave her excellent performance rating. (Pl.'s Resp. to Def.'s 56.1 ¶ 55). Richard Green believes that Plaintiff has a "problem getting along with people," and experiences "conflicts on the job." (Green Dep. at 33). At one point, Assistant Superintendent Flenory Barnes called Plaintiff a "bitch." (Pl.'s 56.1 ¶ 43). He was forced to apologize. (Pl.'s 56.1 ¶ 43). On June 9, 1998, Plaintiff filed a grievance against Sam Lowery, who was an acting foreman, for his vulgar language directed at Plaintiff, which allegedly included telling her to "kiss his ass" and "fuck you." (Pl.'s 56.1 ¶ 45). Plaintiff made repeated complaints about the language of various supervisors and fellow employees. (Pl.'s 56.1 ¶ 58, 64, 66).

Andrew Melleski received a promotion for a position for which he did not score lower than Plaintiff. (Def. Res. to facts at ¶ 97). Likewise, Raymond Bynum received higher scores than Plaintiff for the promotion that he ultimately received. (Def.'s 56.1 ¶ 57).

ANALYSIS

Plaintiff's Title VII claims take three forms: discrimination, retaliation, and failure to promote.[2]

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[2] In Plaintiff's Response to Defendant's Motion for Summary Judgment, she alleges that Defendant was aware of the "sexually hostile work environment." As the Plaintiff points out, the burden for

(Continued on following page)

Discrimination

Plaintiff contends that Defendant City of Chicago discriminated against her in violation of Title VII when it failed to post bids for the position of Plumber Inspector in accordance with the labor contract, compelled Plaintiff to work on a truck which emitted toxic fumes, and failed to discipline a management employee who called Plaintiff a "bitch."

In this case, Plaintiff has presented no direct evidence of discrimination but has attempted to prove discrimination indirectly by arguing that she was treated differently from other similarly situated employees because of her sex. To prove discrimination indirectly, Plaintiff must establish that: (1) she is a member of a protected class; (2) that she suffered an adverse employment action; (3) that she was meeting her employer's legitimate performance expectations; and (4) that her employer treated similarly situated employees who were not in the protected class more favorably. *Maarouf v. Walker Manufacturing Co.*, 210 F.3d 750, 751 (7th Cir. 2000). Plaintiff's claims of discrimination fail because she has not met her burden of establishing the second and fourth elements.

Defendant's failure to adequately publicize promotional opportunities, use of potentially dangerous equipment, and failure to discipline a management employee who called Plaintiff a "bitch" do not constitute "adverse

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establishing a hostile work environment claim under Title VII is different from other Title VII claims. *See e.g., Saxton v. A.T. & T.*, 10 F.3d 526, 534 (7th Cir. 1993). The comments and conduct to which Plaintiff refers (Pl. Res. 3-6) will therefore be considered as circumstantial evidence of her other claims.

employment actions" actionable under Title VII. The Seventh Circuit explained what constitutes a "materially adverse employment action" in *Crady v. Liberty National Bank and Trust Co. of Indiana,* 993 F.2d 132, 135 (7th Cir. 1993). It noted:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

In *Crady,* the Seventh Circuit found that a change to position from assistant vice-president and manager of one branch of a bank to a loan officer at a different branch did not, by itself, constitute an adverse employment action. *Id.* A Court does "not sit as a super-personnel department that reexamines an entity's business decisions." *Wolf v. Buss,* 77 F.3d 914, 920 (7th Cir. 1996).

Although an employer's failure to discipline an employee when he calls another a "bitch" might be evidence of a hostile work environment, in and of itself, it is not actionable under Title VII. In *Galloway v. General Motors Service Parts Operations,* 78 F.3d 1164, 1167 (7th Cir. 1996), the Seventh Circuit found that a co-worker's description of a female employee as a "sick bitch," his statement to her "if you don't want me, bitch, you won't have a damn thing," and his use of an obscene gesture while telling the female employee to "suck this bitch" were not actionable under Title VII.

Plaintiff has also failed to meet her burden of raising a disputed issue of material fact as to whether employees outside the protected class were treated more favorably. Plaintiff has not shown that promotional opportunities were communicated to male but not female employees, that male employees were not exposed to the allegedly dangerous truck, or that male employees were never subjected to abusive language by co-workers.

Retaliation

Plaintiff alleges that Defendant City of Chicago retaliated against her in violation of Title VII "for reporting the hazards associated with the toxic fumes being emitted from Truck No. 337." (2A. Compl. 4).

To establish a prima *facie case* of retaliation[3] under Title VII, Plaintiff must establish that: (1) she engaged in "statutorily protected expression"; (2) she suffered an adverse, job-related action by her employer; and (3) there is a causal link between her opposition to unlawful discrimination and the adverse employment action. *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1146 (7th Cir. 1997).

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[3] Title VII, 42 U.S.C. § 2000e-3(a) reads in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice, by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Plaintiff's claim of retaliation fails because she has not met her burden of showing the first and third elements of a retaliation claim. "Statutorily protected expression," under Title VII, consists of opposition to any employment practice made unlawful under Title VII. 42 U.S.C. § 2000e-3(a). Title VII was not intended to protect workers from hazardous conditions in the workplace. Plaintiff admits that the fumes she complained of were "in violation of OSHA standards." (Compl. 4). Therefore, her complaints regarding OSHA violations do not constitute "protected expression" qualifying for protection from retaliation under Title VII.

Furthermore, Plaintiff fails to show the third element, in that she has not established a causal connection between the allegedly protected conduct and any adverse action. Summary Judgment is therefore granted on Plaintiff's retaliation claim.

Failure to Promote

Plaintiff alleges that Defendant discriminated against her when it failed to promote her to the positions of Plumbing Inspector, District Foreman of Water Pipe Construction, and Foreman of Water Pipe Construction. (2A. Compl. 3). Plaintiff has attempted to prove indirectly that Defendant failed to promote her for discriminatory reasons.

To prove a *prima facie* case of failure to promote. Plaintiff must show that: (1) she applied for a promotion; (2) she was entitled to the promotion; and (3) the individual promoted had the same or lesser qualifications. *Bragg v. Navistar International Transportation Corp.*, 164 F.3d 373, 376 (7th Cir. 1998). If Plaintiff makes a *prima facie*

case, the burden shifts to Defendant to show legitimate nondiscriminatory reasons for the non-promotion; if Defendant does that, the "employee must demonstrate that those reasons are lies." *Brill v. Lante Corporation*, 119 F.3d 1266, 1269 (7th Cir. 1997). "Moreover, if the [defendant] honestly believed in those reasons, the plaintiff loses even if the reasons are foolish or trivial or even baseless." *Id.*

In this case, the Plaintiff has failed to meet her burden of raising a material issue of fact as to whether Defendant's stated reasons for not promoting her are pretextual. Plaintiff was interviewed by a number of different panels of interviewers. She was scored in areas which included previous work experience, supervisory experience, oral and written skills, and technical knowledge. Plaintiff has not provided evidence that any of the interviewers "did not honestly believe" their stated reasons for giving Ms. Hall the scores they did. "Just as a district court is not required to scour the record looking for a factual dispute, it is not required to scour the party's various submissions to piece together appropriate arguments." *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995).

The evidence that Plaintiff does provide is insufficient to establish pretext. Plaintiff offers the assessment by Mr. Megaro that she was an excellent plumber. (Pl.'a 56.1 ¶ 11). However, this assessment in no way contradicts the interviewers' assessments of Plaintiff's communication and interpersonal skills.

Plaintiff also cites vulgar comments by Flenory Barnes and co-workers as evidence that the rankings

given in the evaluations were pretextual. However, Plaintiff has not shown that any of these statements were linked to the promotion decisions. The "plaintiff must show that the remarks 'were related to the employment decision in question.'" *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1402 (7th Cir. 1996).

Plaintiff argues that the fact that Andrew Melleski ultimately received a promotion when he scored lower than Plaintiff in one round of interviews means that Defendant's stated reason for not promoting her is pretextual. However, Melleski did not receive the promotion to the position for which he scored lower than Plaintiff in the interviews. Rather, he received a promotion for another position for which he did not score lower than Plaintiff. (Def. Res. to facts at ¶ 97). Likewise, Raymond Bynum received higher scores for the promotion that he ultimately received. (Def.'s 56.1 ¶ 57). Furthermore, Bynum had been Plaintiff's supervisor.

Plaintiff has not provided any evidence that the interviewers did not believe the stated reasons for their scoring. Plaintiff interviewed before a number of different panels made up of various supervisors. Time and again, she received lower scores than her peers. Once more, Plaintiff has failed to raise any material direct or indirect evidence linking Defendant's promotion decisions to her gender.

As to the position of acting Foreman, this was not a position Plaintiff cited in her Second-Amended Complaint. Therefore, Defendant's alleged failure to promote her to this position cannot allow her to survive summary judgment. "A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for

summary judgment." *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996). However, even if the fact that Plaintiff was never named acting foreman is considered, Plaintiff's claim nonetheless fails since she has not shown that her employer's promotion decisions regarding the acting foreman position were based on gender.

Although Plaintiff claims that two individuals were promoted for positions for which she was told the bids were canceled, Plaintiff has not shown that the bid numbers for these positions were the same ones for which she applied. (Pl.'s 56.1 ¶ 94, 95).

Summary judgment is granted on Plaintiff's failure to promote allegations since she has failed to meet her burden of raising a material issue of fact as to whether Defendant's stated reasons for not promoting her are pretextual.

CONCLUSION

For the reasons stated herein, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

/s/ John W. Darrah
John W. Darrah, Judge
United States District Court

Date: March 29, 2001